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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ROSAURA DERAS, ALEXANDER
SANTIAGO and MARIA ELENA
SANTIAGO, individually and on behalf of
a class of similarly situated individuals,

Case No. 3:17-cv-05452 JST

**VOLKSWAGEN GROUP OF AMERICA,
INC.'S NOTICE OF MOTION AND
PARTIAL MOTION TO DISMISS SECOND
AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: November 1, 2018
Time: 2:00 p.m.
Location: Courtroom 9
Judge: Hon. Jon S. Tigar



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1 **NOTICE OF MOTION AND MOTION TO DISMISS:**

2 **PLEASE TAKE NOTICE** that on November 1, 2018 at 2:00 p.m., or as soon thereafter
3 as this matter may be heard, before the Honorable Jon S. Tigar in Courtroom 9 of the United
4 States District Court for the Northern District of California, located at 450 Golden Gate Avenue,
5 San Francisco, California, 94102, Defendant Volkswagen Group of America, Inc. will, and
6 hereby does, move the Court for an order dismissing all Plaintiffs' claims under Counts II, III,
7 and V of the Second Amended Complaint ("SAC") for failure to state a claim upon which relief
8 can be granted, pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b).

9 This Partial Motion to Dismiss is based on this Notice of Motion and Motion, the
10 Memorandum of Points and Authorities in Support, the Second Amended Complaint and matters
11 incorporated or referenced therein, matters that may be judicially noticed, other documents filed
12 in this case, and upon such other matters as may be presented to the Court at the time of the
13 hearing.

14 The briefing schedule is pursuant to the Court's order, Dkt. No. 54.

16 Dated: July 30, 2018

17 HERZFELD & RUBIN LLP

18 By: */s/ Michael B. Gallub*
19 Michael B. Gallub (admitted Pro Hac Vice)
20 Attorneys for Defendant
21 VOLKSWAGEN GROUP OF AMERICA, INC.
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STATEMENT OF ISSUES TO BE DECIDED PER CIVIL L.R. 7-4(a)(3)

Whether Plaintiffs' second, third, and fifth causes of action under the Consumers Legal Remedies Act (CLRA), Unfair Competition Law (UCL), and common-law fraud by omission should be dismissed for failure to plead facts plausibly stating a claim upon which relief can be granted.

I. PRELIMINARY STATEMENT

As set forth below, Plaintiffs' UCL, CLRA and fraud by omission claims in the Second Amended Complaint ("SAC") still suffer from the fatal pleading deficiencies for which this Court, in its May 17, 2018 Order (Dkt. No. 47), dismissed those claims in the First Amended Complaint ("FAC") (the "Dismissal Order").¹

In the Dismissal Order, the Court discussed in detail Plaintiff’s attempt to sufficiently establish the required element that VWGoA had knowledge of the alleged defect prior to the time in which Plaintiff leased and/or purchased her vehicle. *Id.* at 6-10. The Court held the allegations to be insufficient to establish that VWGoA had the requisite pre-sale knowledge. *Id.* Plaintiff’s allegations regarding 56 consumer complaints to NHTSA, out of “potentially hundreds of thousands or more’ Class Vehicles,” did not meet the Ninth Circuit’s requirement of establishing that ““there were an *unusual* number of complaints, such that the manufacturer would be on notice of a specific problem.”” *Id.* at 7 (quoting *Sloan v. Gen. Motors LLC*, 2017 WL 3283998, at *7 (N.D. Cal. Aug. 1, 2017)(emphasis in original)). Additionally, the allegations that VWGoA had an “internal monitoring” system that tracks information regarding all sunroof failures through sources including consumer complaints and incident reports, warranty claims, information from dealers, drivers and insurance companies, test data, replacement parts data and “other aggregated data sources” was “insufficient to allege knowledge of a defect.” *Id.* at 7 (citing *Resnick v. Hyundai Motor Am., Inc.*, 2017 WL 1531192, at *14 (C.D. Cal. Apr. 13, 2017)).

¹ The Court dismissed with prejudice Plaintiff's claim for unjust enrichment. Dismissal Order at 5-6. That claim is, accordingly, not replied in the SAC.

1 any “allegations that these quality control mechanisms were put in place in response to’ the
 2 alleged defect.” *Id.* at 8 (quoting *Resnick* at *14).

3 Plaintiff had also attempted to alleged pre-sale knowledge premised upon the fact that
 4 other automotive companies, and VW and Audi, had previously instituted recalls of other
 5 vehicles that, Plaintiff alleged, had similarly designed panoramic sunroofs. The Court found that
 6 even if this were true, and the other vehicles’ sunroofs were, in fact, similarly designed, that is not
 7 enough, in itself, to establish the requisite pre-sale knowledge of Plaintiff’s alleged defect. *Id.* at
 8 9-10. The Court stated: “[Plaintiff] has cited no authority, and this Court is aware of none,
 9 holding that prior recalls of similarly designed products is, standing alone, sufficient to establish
 10 knowledge of a defect.” *Id.* at 10. The Court concluded that “[b]ecause [Plaintiff’s] other
 11 allegations regarding knowledge are deficient, the Court dismisses the UCL, CLRA, and fraud by
 12 omission claims with leave to amend.” *Id.*

13 The SAC, while adding two new Plaintiffs (Alexander and Maria Elena Santiago), fails to
 14 cure the deficiencies enumerated by the Court. It is based primarily upon the same conclusory
 15 assertions found by the Court to be insufficient, with some additional conclusory assertions which
 16 are similarly vague, bereft of supporting facts, and insufficient to establish the requisite pre-sale
 17 knowledge by VWGoA of the alleged defect. For the reasons discussed below, Plaintiffs’ UCL,
 18 CLRA and fraud by omission claims should be dismissed with prejudice.

19

20 **II. LEGAL STANDARDS GOVERNING THIS MOTION**

21 The well settled standards governing a Rule 12(b) motion were discussed by the
 22 Court at pp. 3-4 of the Dismissal Order, respectfully incorporated by reference here.

23

24 **III. ARGUMENT AND POINTS OF DISCUSSION**

25 **A. Plaintiffs’ UCL, CLRA and Fraud By Omission Claims Must Be Dismissed**

26 **(Counts II, III, V)**

27 As this Court observed, “[t]he parties do not dispute that the UCL, CLRA and fraud by
 28 omission claims require [Plaintiff] to allege that VW had knowledge of the alleged defect at the

1 time of sale or lease.” Dismissal Order at 6 (*citing Wilson v. Hewlett-Packard Co.*, 668 F.3d
 2 1136, 1145 n.5 (9th Cir. 2012). *See also Elias v. Hewlett-Packard Co.*, 950 F. Supp. 2d 1123,
 3 1137 (N.D. Cal. 2013); (“The failure to disclose a defect that a manufacturer does not have a duty
 4 to disclose, *i.e.*, a defect of which it is not aware, does not constitute an unfair or fraudulent
 5 practice” under the UCL.); *Sloan v. Gen Motors LLC*, 2017 WL 3283998, *5 (N.D. Cal. Aug. 1,
 6 2017) (in California, “a fraudulent omission claim requires proof that a defendant was aware of
 7 the defect at the time of sale to establish defendant had a duty to disclose”).

8 The SAC is devoid of any well-pleaded facts demonstrating that VWGoA was aware of
 9 the alleged defect at the time of Plaintiffs’ purchases.

10 **1. Internal Monitoring**

11 The allegations in the SAC regarding internal monitoring are essentially the same as the
 12 allegations this Court found to be insufficient in the FAC. *Compare SAC ¶ 28-29 to FAC ¶ 28;*
 13 Dismissal Order at 7. In its Dismissal Order, the Court quoted the following from a recent
 14 decision rejecting similar allegations against Hyundai:

15 [W]hile Plaintiffs now allege that Hyundai had significant quality-monitoring
 16 processes in place, including its OSQC, a reorganized quality control
 17 department, a “Global Quality Situation Room,” and ongoing communication”
 18 with customers, they have not sufficiently alleged *how* any of these quality
 19 control mechanisms placed Defendants on notice that there was a possible
 20 paint defect in their vehicles. (*See CCAC ¶¶ 66-71.*) The fact that Defendants
 21 had quality control programs in place on the one hand, and that several
 22 consumers made anonymous complaints online with a few indicating that they
 23 spoke to a Hyundai dealership or to its customer service department on the
 24 other hand, fails to establish knowledge of a widespread *defect*. Plaintiffs
 25 include no allegations indicating that random complaints received across the
 26 country would alert Hyundai’s international quality control department to an
 27 alleged paint defect.

28 / / /

1 Dismissal Order at 8, quoting *Resnick v. Hyundai Motor Am., Inc.*, 2017 WL 1531192, at *14
 2 (C.D. Cal. Apr. 13, 2017).

3 This Court found Plaintiff's allegations lacking because Plaintiff "alleged no similar facts
 4 to support a conclusion that VW's internal monitoring mechanisms caused VW to know 'of a
 5 widespread defect.'" Dismissal Order at 8 (quoting *Resnick* at *14). In addition, the Court found
 6 Plaintiff did "not provide any allegations regarding the method by which complaints were
 7 recorded and transmitted to management, or otherwise reviewed or received,' or any 'allegations
 8 that these quality control mechanism were put in place in response to' the alleged defect." *Id.*
 9 (quoting *Resnick* at *17).

10 Since the SAC fails to cure these fatal deficiencies, Plaintiffs' allegations of VWGoA's
 11 internal monitoring fail to establish the requisite pre-sale knowledge. *See also Burdt v.*
 12 *Whirlpool Corp.*, 2015 WL 4647929, at *4 (N.D. Cal. Aug. 5, 2015) (rejecting allegations of
 13 knowledge based upon pre-release testing as "merely speculative," and specifically noting that
 14 "the fact that the alleged defect did not appear until eleven months after purchase suggests that
 15 the pre-release testing may not have revealed an alleged defect that only appeared after such
 16 extended use"); *Grodzitsky v. Am. Honda Motor Co.*, 2013 WL 690822 *6 (C.D. Cal. Feb. 19
 17 2013) (rejecting "knowledge" and "duty to disclose" allegations premised on claim that Honda
 18 knew of a defect based on "pre-release testing data, early consumer complaints to Honda and
 19 dealers, testing done in response to complaints, replacement part sales data, aggregate data from
 20 Honda dealers, and other internal sources"); *Berenblat v. Apple, Inc.*, 2010 WL 1460297, at *9
 21 (N.D. Cal. Apr. 7, 2010) (allegations of 350 complaints on defendant's website do not
 22 sufficiently plead knowledge of defect; they "merely establish that some consumers were
 23 complaining").

24 **2. NHTSA Complaints**

25 The SAC continues to rely upon the same 56 anonymous hearsay NHTSA complaints that
 26 this Court held as insufficient to establish VWGoA's pre-sale knowledge of the alleged defect.
 27 Dismissal Order at 7. The Court stated, "the Ninth Circuit has held that consumer complaints
 28 suffice to establish knowledge only where there were an *unusual* number of complaints, such that

1 the manufacturer would be on notice of a specific problem.” *Id.* at 7 (quoting *Sloan v. Gen.*
 2 *Motors LLC*, 2017 WL 3283998, at *7 (N.D. Cal. Aug. 1, 2017)). The Court held that “[f]orty-
 3 five, or even fifty-six, complaints out of hundreds of thousands of vehicles does not on its face
 4 indicate an unusually high number of complaints,” and “do not show VW’s knowledge of the
 5 alleged defect.” *Id.* (citing *Sloan* at *7). The SAC, which carries forth essentially the same
 6 allegations, fails for the same reasons. SAC ¶ 38, 74; *see also Baba v. Hewlett Packard Co.*,
 7 2011 WL 317650, at *3 (N.D. Cal. Jan. 28, 2011) (“Awareness of a few customer
 8 complaints...does not establish knowledge of an alleged defect.”); *Berenblat v. Apple, Inc.*, 2010
 9 WL 1460297, *9 (N.D. Cal. Apr. 7, 2010) (allegations of 350 complaints on defendant’s website
 10 do not sufficiently plead knowledge of defect; they “merely establish that some consumers were
 11 complaining”).

12 The SAC tries to bootstrap these failures by adding an allegation that the 56 NHTSA
 13 complaints purportedly “represents in fact an unusually high number of complaints” since “[t]he
 14 NHTSA database tends to contain far fewer complaints than VW’s internal databases.” SAC ¶ 30.
 15 No pleaded facts or plausible bases are offered to support this speculative conclusory assertion,
 16 which fails to establish an “unusual number of complaints” out of the “hundreds of thousands of
 17 vehicles” needed to impute pre-sale knowledge of the alleged defect. Similarly unavailing is the
 18 SAC’s added conclusory allegation that VW participated in unspecified discussions, meetings
 19 and conferences regarding “the defects associated with the Class Vehicles.” *Id.* The SAC fails to
 20 plead any facts showing what the purported discussions, meetings and conferences were; when
 21 and where they purportedly took place; who if anyone employed by VWGoA was present or
 22 participated; the sum and substance of what was purportedly discussed; when and in what manner
 23 it was communicated to any decision-makers within the Company; and the manner in which this
 24 purportedly conveyed to VWGoA pre-sale knowledge of the defect alleged by Plaintiffs. These
 25 hollow, speculative and conclusory assertions are not entitled to a presumption of truth, *see*
 26 *Somers v. Apple, Inc.*, 729 F.3d 953, 959-60 (9th Cir. 2013), and fail to establish the essential
 27 requirement of pre-sale knowledge.

28 ////

3. Prior Recalls

In the Dismissal Order, the Court found that Plaintiffs' allegations regarding knowledge of prior recalls of purported similarly designed sunroofs by other automotive manufacturers, and by VW and Audi, are not, standing alone, sufficient to establish pre-sale knowledge by VWGoA of Plaintiff's alleged defect. Dismissal Order at 10. The Court concluded: "Because [Plaintiff's] other allegations regarding knowledge are deficient, the Court dismisses the UCL, CLRA, and fraud by omission claims with leave to amend." *Id.*

The SAC, while essentially the same as the FAC in this regard, adds several conclusory allegations in an attempt to bolster the prior recalls: (a) the investigation by NHTSA into certain Hyundai and Kia sunroofs that led to their prior recall, which investigation neither involved nor made any conclusions regarding any VW vehicles; (b) the mere fact, without anything else, that NHTSA requested information from various automotive companies including VWGoA in connection with the Hyundai and Kia investigation, yet took no further action; and (c) the mere existence of an investigation by a South Korean agency (KATRI) which allegedly generally concluded that panoramic sunroofs, not specific to any VW sunroof, are purportedly “prone to shattering” (collectively, SAC ¶¶ 31-35, 47). These conclusory allegations essentially fall within the same prior recalls category that the Court found, standing alone, as insufficient to establish pre-sale knowledge in view of the fact that Plaintiffs’ “other allegations of knowledge are deficient.” Dismissal Order at 10. Since the SAC fails to cure the other deficient allegations discussed *supra* (internal monitoring and NHTSA complaints), the added allegations in this category, standing alone, remain insufficient to sustain Plaintiffs’ UCL, CLRA and fraud by omission claims.

In any event, the additional conclusory allegations are deficient on their face. The mere allegation that NHTSA, in connection with a Hyundai/Kia investigation, requested information from other automotive companies including VWGoA does not establish that VWGoA had pre-sale knowledge of the defect alleged by Plaintiffs. There is no dispute that VW vehicles are not the subject of that NHTSA investigation which underlied the prior recalls of Hyundai and Kia vehicles. Other than a mere request for information directed to the industry, the SAC pleads no

1 factual allegation that NHTSA took any steps, opened any investigation or made any
 2 determination regarding the sunroofs of *any* VW vehicle, much less the *Plaintiffs'* vehicles at
 3 issue here. Nor are there any pleaded facts showing how the mere request for information would,
 4 in any event, establish the requisite pre-sale knowledge of Plaintiffs' alleged defect.

5 The same holds true with the conclusory allegations regarding the South Korean KATRI
 6 investigation (SAC ¶ 47). The mere allegation that a foreign entity found that some panoramic
 7 sunroofs in general could, under circumstances and conditions not pled in the SAC, be "prone" to
 8 shattering, does not establish knowledge of any VW sunroof defect, much less the defect alleged
 9 in Plaintiffs' vehicles. The SAC fails to plead any facts establishing that the KATRI
 10 investigation involved or impugned the sunroofs of *any* VW vehicles, much less the Plaintiffs'
 11 vehicles. The SAC also fails to establish that the sunroofs being investigated in South Korea were
 12 the same or similar to the sunroofs in the vehicles purchased by Plaintiffs. The SAC likewise fails
 13 to allege that KATRI advised any motor vehicle companies, much less VWGoA, to cease
 14 production of such vehicles due to any widespread sunroof defect. There is also no allegation
 15 that Plaintiffs' vehicles failed to conform to KATRI's suggested guidelines or specifications for
 16 sunroofs. Thus, the SAC pleads no facts from which pre-sale knowledge of Plaintiffs' alleged
 17 defect can be imputed to VWGoA, based on the conclusory and insufficient assertions about the
 18 KATRI investigation.

19 The SAC's added conclusory allegations do not establish the requisite pre-sale knowledge
 20 in the face of the other continued deficient "knowledge" allegations discussed *supra*.
 21 Accordingly, the UCL, CLRA and fraud by omission claims should be dismissed with prejudice.
 22

23 **IV. CONCLUSION**

24 For the foregoing reasons, VWGoA respectfully requests that Counts II, III, and V of the
 25 SAC be dismissed pursuant to Fed. R. Civ. P. 12(b) (6) and 9(b); together with costs and
 26 disbursements, and such other and further relief as the Court deems just and proper. Moreover,
 27 since this is Plaintiffs' third attempt at pleading, and Plaintiffs have failed to cure the fatal
 28 ////

1 deficiencies enumerated in this Court's Dismissal Order, those claims should be dismissed with
2 prejudice.

3
4 Dated: July 27, 2018

HERZFELD & RUBIN, PC

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6 By: /s/ Michael B. Gallub
7 Michael G. Gallub (admitted *Pro Hac Vice*)
8 Attorneys for Defendant
VOLKSWAGEN GROUP OF AMERICA, INC.



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